IN MARSHALL'S DAY AND OURS.

To the student of the law the contemplation of Marshall's lofty character is an inspiration and the study of his masterly judgments an education. And yet how little is known by the people at large of the man to whom more than to any other, save Washington, is due the credit of laying broad and deep the foundations of the Union! The lesson of his great career should be taught, not only in the law schools and colleges, but in the public schools as well.

John Marshall was born October 24, 1755. He died July 6, 1835, in the eightieth year of his age. He was educated at home under the direction of his father, who was a planter and surveyor. In September, 1776, he entered the army of the Revolution and remained in the service until 1781. In 1782 he was elected to the Legislature of Virginia, and in the autumn of the same year was chosen a member of the Executive Council. In 1784 he resigned his seat in the Executive Assembly and came to the bar, where he remained until 1797, when, with Mr. Pinckney and Mr. Gerry, he went on a mission to France. In 1799 he was elected to Congress. At the close of the first session he accepted the portfolio of state and remained in that office until February 4, 1801, when he took his seat as Chief Justice, which office he retained until his death, thirty-four years afterward. At the age of seventy-four he served with Madison and Monroe as a member of the Virginia Constitutional Convention. This brief statement contains all of the salient features of his career.

That stirring incidents are few is evident. This must always be so in the life of a judge, no matter how eminent. He is withdrawn from events of large magnitude. He necessarily leads the life of a recluse. He becomes an investigator, a patient student of the science of law. His fame rests not on the "arduous greatness of things done," but upon things written and spoken. The reputation of a great jurist, like that of a great author, must be looked for in

his published works. The lives of such men are eventless and common place from the point of view of the historian and biographer, but their beneficent influence upon the country fortunate to possess them is more lasting than that of the soldier or statesman whose life scintillates with political and martial electricity.

Perhaps the most conspicuous service which Marshall rendered outside the field of judicial labor was as envoy to France in the autumn of 1797. We had concluded a treaty with England, thus exciting the animosity of the Directory and of a large and vociferous party at home, whose admiration for France was only paralleled by their dislike of England. It is difficult to quarrel with the generous, but unreasoning, sentiment which induced many impulsive patriots to espouse the cause of our revolutionary ally in her struggle with our ancient foe. Sentiment, sympathy, gratitude and revenge united to place America by the side of France.

The government had wisely proclaimed a policy of "neutrality" in the pending European contest, but this did not suit the young and ardent Jacobins on this side the sea, who shouted for war—war against England, war for France.

At this time, when the air was surcharged with war-like energy, came the Minister of the Directory—Citizen Genet, one of those spluttering meteors which zigzagged at intervals across the lurid sky of the Revolution and plunged with a final splash and sizzle into the ocean of oblivion. Mistaking the blatant huzzas of the mob for the calm judgment of the Nation, Genet proceeded upon the theory that he could ignore the officers of state and deal directly with the people. He enlisted men for the French armies, sanctioned the fitting out of privateers to prey upon our commerce, and conducted himself as if he were the leader of a victorious party dictating terms to the vanquished.

The minister whom we had sent to France was insulted and ordered out of the country. The situation was intolerable and such that the slightest mistake of the administration might plunge the country into war. At this crisis President Adams sent three envoys, John Marshall, Charles C. Pinckney and Elbridge Gerry, to France for the purpose of arranging a convention which should put an end to the insolence we had endured at the hands of the Directory and

secure indemnity for the damage our commerce had suffered from French privateers. The commissioners landed in October, and from that time until the following June they were ignored, snubbed, browbeaten and insulted in a manner which, as individuals, they would not have tolerated for a moment, but which they endured with unwavering dignity and calm patience, in order that their country might be spared the perils of another war.

Marshall, the plain, direct, chivalrous country gentleman, who knew no policy but that of honesty, and who spoke no language but that of truth, was pitted against Talleyrand, the most unscrupulous and accomplished diplomatist of the age, with the possible exception of Prince Metternich. What a contrast, Marshall and Talleyrand! Marshall, the pure and disinterested patriot. Talleyrand, the dissolute and licentious intriguer, who had served and betrayed, and was to continue to serve and betray, every government from Bourbon to Directory and emperor, and back again to king.

The commissioners were not officially recognized, and the most astonishing demands were made upon them by Talleyrand as a condition precedent to their recognition. If these were refused, war was threatened, with Napoleon at the head of the armies of France. Talleyrand even went so far as to assert that the great majority of American citizens were opposed to the course adopted by the commission and would resent it at the polls. To this Marshall replied, " M. Talleyrand may be assured that the fear of censure will not induce us to deserve it."

The commissioners failed to accomplish the object which brought them to Paris, but, on the other hand, they foiled the designs of Talleyrand and kept their own and their country's honor unsullied.

Marshall returned in advance of his colleagues, and at Philadelphia was given a magnificent ovation. At the public dinner in his honor the famous phrase was originated: " Millions for defence, but not one cent for tribute."

The autumn election of 1800 resulted in the defeat of Adams and the election of Jefferson. Chief Justice Ellsworth having, in November, 1800, resigned on account of ill health, Marshall, on being consulted, recommended

Associate Justice Paterson for the place, but the President hesitated to wound the feelings of Mr. Justice Cushing, who was senior in rank to Paterson and an old friend of the President. Marshall, being again consulted, recommended that John Jay should be invited to return to his old position. The invitation was extended and declined. Thereupon Marshall was appointed. The nomination was unanimously confirmed, and, on January 31, 1801, he was commissioned as Chief Justice. He was then forty-five years of age. President Adams said long afterward that if he had done nothing else but appoint John Marshall Chief Justice, he could afford to let his fame rest upon that single act.

Looking back at the inestimable benefits to his country and humanity which flowed from that appointment, the patriot hesitates to contemplate what might have been the result had the place gone to another.

Marshall's appointment depended upon a series of contingencies. What if Ellsworth had not resigned, if Paterson had been appointed, if Jay had accepted? Not that they were lacking in ability and patriotism, but one of them, at least, was known to entertain pessimistic views of the future based upon the supposed weakness of the Constitution. No one of them could have entered upon the task of building up the Nation and labored upon it with the cheerful and patient enthusiasm which inspired Marshall during thirty-four years.

Just one month after Marshall took his seat as Chief Justice, Jefferson took his seat as President. What would have been the result had the Chief Justice been named by him? With his well-known apprehension regarding a strong central government and his antipathy to an independent judiciary, is it too much to say that the ship of state, had she kept afloat until 1861, would have been dashed to pieces by the tempest of the civil war? So does the safety of states and the progress of mankind depend upon the most trivial incidents!

It would not be difficult to demonstrate that the existence of our vast empire, as we know it to-day, is due to the fact that Oliver Ellsworth was taken ill at Paris in November, 1800. The resignation gave us an incomparable judge, and he gave us an incomparable Constitution.

Before entering upon a consideration of Marshall's work in the Supreme Court, it is proper to mention two incidents in his life which cannot properly be considered under that head. I allude to the trial of Aaron Burr for treason and Marshall's appearance at the age of seventy-four in the Virginia Constitutional Convention. His part in the convention was not prominent. He acted as a counselor and friend of all, arranging compromises and preventing unseemly outbreaks among the delegates. One address he made, however, which contains words of wisdom, which are even truer to-day than they were when he uttered them seventy years ago; words of warning which every patriot should heed and follow if he hopes to see the judiciary respected in the future as it has been in the past. He said that, "The greatest scourge an angry Heaven can inflict upon an ungrateful and sinning people is an ignorant and corrupt, or a dependent, judiciary."

Perhaps the most trying position of his life was that assumed by Marshall when, in the summer of 1807, he went down to the Virginia Circuit to preside at the trial of Aaron Burr, the district judge, Cyrus Griffin, being associated with him. Marshall was no friend of Burr. On the other hand, from the day of his first acquaintance with him in the army he had been the ardent and devoted friend and admirer of Hamilton. Every motive of a personal consideration induced him to urge the conviction of Burr.

The trial was one in which every politician was interested upon the one side or the other. Public sentiment was, however, against the accused, and it would have pleased, not only the leaders of the Republican party, of which Jefferson was the head, but also many chiefs of the Federal party, had Burr been convicted.

Amidst all this whirlwind of passion the Chief Justice stood serene. Never once did he permit his personal feelings or inclinations to sway his judgment, and he held the law with the same impartiality as though the defendant were a poor and friendless stranger. Although there was scarcely a doubt that Burr had taken steps to realize his dream of a southwestern empire and had organized an armed force to assist in its establishment, there was no actual proof of his connection with any overt act as charged in the in-

dictment. Upon this ground the Chief Justice practically ordered a verdict of not guilty.

During the progress of the trial the Chief Justice was informed by the press and by counsel in open court how intensely the American public demanded a conviction. The mad clamor raged all around him and that he felt its force may readily be believed. But he had planted himself on the rock of the law and refused to budge a single inch.

It was, perhaps, in answer to these appeals to "wrest once the law to his authority," that in the last remarks which he addressed to the jury we find these words:

"That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

For years afterward the storm of abuse ceased not to beat upon the head of the Chief Justice. President Jefferson, in a message to Congress, expressed his grave dissatisfaction at the result of the trial. But amid all this angry tumult the Judge stood firm, unmoved, undaunted, like the great Hollander, *sævis tranquillus in undis*, awaiting the sure judgment of posterity.

We come now to consider Marshall's great work in the Supreme Court, for it is his record as a judge that entitles him to rank among the immortals. In quantity the work done was insignificant when compared with the work of the present day; in quality it has never been surpassed.

During the entire period of Marshall's incumbency but eleven hundred and six opinions were filed. Of this number five hundred and nineteen were delivered by Marshall, the remainder being unequally divided among the other members of the court. Sixty-two decisions were rendered upon constitutional questions, and thirty-six of these were written by Marshall.

His first great constitutional cause was Marbury *v.* Madison, decided at the February Term, 1803.[1]

[1] 1 Cranch, 137.

It was argued that the Court had no power to declare an Act of Congress unconstitutional. This contention was tossed by the Chief Justice like an angry bull, and, after goring it till life was extinct, he threw it to the ground and trampled it into the mire.

"This doctrine," he said, "would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

In the light of the present this decision seems but "proofs of holy writ." It is inconceivable that any other opinion could ever have been entertained. Yet at the beginning of the last century, not only was the contrary view entertained, but advocated by a strong and progressive party. Marbury *v.* Madison was the first authoritative declaration that a court could declare void an act of the legislature. For a time men stood dumbfounded at the novelty of the doctrine, and then the storm of denunciation began to rage. Jefferson took no pains to conceal his disapprobation at what he regarded as a usurpation of power by the Court. In Rhode Island and Ohio attempts were made to punish by impeachment judges who followed the law as laid down by the Supreme Court. To-day all thoughtful men agree that without this power to declare vicious enactments invalid the Union could not exist. This is American doctrine. The credit of proclaiming it belongs to us.

No court beyond the limits of our Union has ever attempted to declare an act of the law-making body unconstitutional, and it is the absence of this power which has so often left constitutional countries at the mercy of unwise laws placed upon the statute book in hours of political frenzy.

In Cohens *v.* Virginia,[1] the Court took another long stride towards nationality.

[1] (1821) 6 Wheaton, 264.

The defendant was adjudged guilty under a State law of selling lottery tickets at Norfolk, Va., in a lottery to be drawn at the city of Washington. The defendant sued out a writ of error. The question debated was whether the Supreme Court had jurisdiction to reverse the judgment of a State Court which contravened the Constitution or the laws of the United States.

After a masterly discussion the Chief Justice reached the conclusion, concurred in by every member of the court, that the United States courts were the final arbiters to interpret the Constitution and laws of the United States, and that, when these laws were clearly violated by a State court or a State legislature, the Supreme Court could examine into and annul the law or the judgment so offending.

It is appalling to contemplate the result if the decision had been in favor of the contention, then so popular, that there was no power to correct the evil when rights guaranteed by the Constitution and laws of the United States were encroached upon by the States. The interpretations of the Constitution and laws of the United States would then have been limited only by the number of State courts. The same law would have been valid in one section and invalid in another. Upon one side of an imaginary line an act would have been lawful and right, and upon the other side it would have been a crime. The country, thus left the unprotected victim of contending passions, would soon have relapsed into a condition of legalized anarchy.

The wisdom and necessity for this decision was illustrated soon after in the case of Worcester *v.* Georgia,[1] in which a missionary to the Indians had been convicted under a law of Georgia of the crime of entering and residing upon an Indian reservation within that State without a license, as required by the State law. The Court held that the Indian territory within the State was wholly under the control of the United States, and that the State had no authority over the Cherokee Nation of Indians or their lands except as permitted by the treaties and laws of the United States. The law under which Worcester was imprisoned was consequently declared to be null and void.

Contemplate the situation for a moment!

[1] (1832) 6 Peters, 515.

Worcester went upon the reservation at the request of the Indians, for the purpose of teaching them and preaching to them the gospel. His only fault was in failing to procure a license, and for this he was convicted of an infamous crime and sentenced to four years at hard labor. It seems incredible now that any civilized State should have perpetrated such a wrong. And yet similar laws were constantly being enacted in various sections of the Union. What would have been the result had there been no restraining power?

The State of Georgia treated the Worcester decision with defiance. The missionary was kept in prison doomed to hard labor, the Governor declaring that he would hang him in the prison yard before he would set him free at the dictation of the Supreme Court. President Jackson, instead of bowing to the mandate of the court, openly espoused the side of the State and declared with all his fiery vehemence, "John Marshall has made his decision, now let him execute it." But after maintaining a stubborn opposition for eighteen months the State officials seem to have been impressed with the injustice of holding the prisoner under a void commitment, and Worcester was set free.

The great case of McCulloch *v.* The State of Maryland[1] is justly regarded as one of the greatest, if not the greatest, of Marshall's decisions.

The questions decided were these:

First. That the act of Congress incorporating the Bank of the United States was constitutional.

Second. That the Bank might lawfully exercise the power of establishing a branch bank in the State of Maryland.

Third. That the State had no power to tax a United States Bank, and its law imposing such a tax was unconstitutional.

In discussing the question of the power of the Congress to incorporate a bank the opinion says:

"If one proposition could command the universal assent of mankind we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action * * * It is the government of all; its powers are delegated by all; it represents all and

[1] (1819) 4 Wheaton, 316.

acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts * * * The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.'"

The Chief Justice then proceeds to establish the proposition that though the chartering of a bank is not among the enumerated powers granted to the general government, it is among the incidental and implied powers so granted. Having reached the conclusion that Congress could incorporate a bank, the answers to the other questions were easy.

To permit the State to tax the bank thus created was to permit the State to destroy the bank. Once admit the right of the State to tax one of the instruments employed by the general government, and the right to tax all was admitted. Property used by the army, the navy, and the post-office establishment could be taxed, and the arm of the general government paralyzed. This shall not be, said Marshall. "What the Constitution has joined together let no State put asunder."

In Gibbons *v.* Ogden,[1] the Court for the first time asserted the power of the general government to regulate commerce between the States and on the navigable waters of the Union. Accordingly a law of New York granting to Livingston and Fulton the exclusive right to navigate with boats propelled by steam the waters within the jurisdiction of the State was held to be inoperative against the laws of Congress regulating the coasting trade.

In the famous case of the Trustees of Dartmouth College *v.* Woodward,[2] the Court held, Marshall as usual writing the principal opinion, that no State law could impair the charter granted by the British Crown to Dartmouth College, under that clause of the Constitution holding sacred the obligations of contracts. Thus all our institutions of learning and charity were rendered safe from the encroachments of populistic legislation. Mr. Justice Miller said of this judgment:

"It may well be doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this."

[1] (1824) 9 Wheaton, 1. [2] (1819) 4 Wheaton, 518.

The unanswerable logic of Marshall's arguments gradually overcame all opposition, and although it was years before full acquiescence was accorded the decisions of the Supreme Court, active hostility and forcible resistance to its mandates gradually melted away.

The encroachments of the States upon the National domain have not yet ceased, and they probably will never cease. Within our own generation we have seen State legislatures attempting to control interstate commerce and regulate the navigation of the public waters of the Union but danger no longer lurks in these attempts. Marshall's decisions have furnished the exegete of organic and statutory law with guides so complete and infallible that they are regarded almost as a part of the Constitution itself.

There is no ambiguity now as to the meaning of the Constitution. It means a nation and not a league.

The list of cases involving constitutional questions might, of course, be increased indefinitely, but in each and all there is the same unalterable determination so to construe the Constitution that the Union may develop along national lines untrammeled by the petty exigencies of sectionalism.

As a constitutional lawyer Marshall was and is without a peer. In his address before the American Bar Association Mr. Edward J. Phelps says of these decisions of the Chief Justice:

> "They passed by universal consent and without any further criticism into the fundamental law of the land, axioms of the law, no more to be disputed. They have remained unchanged, unquestioned, unchallenged. They will stand as long as the Constitution stands. And if that should perish they will remain to display to the world the principles upon which it rose, and by the disregard of which it fell."

Mr. R. T. Barton, in an address upon the "Life and Character of Marshall," before the Washington and Lee University, at Lexington, Va., says:

> "These decisions are the chief stones of the great Federal building; the foundation stones and arch keys which sustain the structure. He who would understand this amazing piece of architecture must not content himself with gazing at what seems to be the completed pile, but he must go down into the crypt and examine its arches and supporting pillars. On every foundation wall, on the span of every arch and the curve of every pillar he will find the words 'Marshall fecit.'"

When Marshall came to the chief justiceship in February, 1801, the Court had been in existence but eleven years. During that time less than one hundred cases had passed under its judgment, an average of nine a year. Each of the seven judges, assuming the work to be evenly divided, had on an average little more than one opinion to prepare each year. The decisions of the Supreme Court filled only five hundred pages of the reports published by Mr. Dallas. The published reports of the colonies and the States filled not more than six or seven volumes. The reported decisions of the circuit and district courts filled less than three hundred of the printed pages of Mr. Dallas.

We have already seen that during the thirty-four years of Marshall's service only eleven hundred and six cases were decided by the Court. These decisions are reported in thirty volumes, from 1 Cranch to 9 Peters inclusive, but they occupy only eleven volumes of the edition of Mr. Curtis, which approximate more closely in size the Supreme Court reports as now published.

The first term presided over by Marshall lasted but five days. The first volume of Cranch embraces the work of two years. All of the opinions, save one, are from the pen of the Chief Justice, and twenty-five cases only are reported. The court had, on an average, but one cause a month to decide. Of course the business increased, but the progress was slow, and in the year 1836, when Taney succeeded Marshall, the number of new causes was only thirty-seven.

During all the time of Marshall's incumbency the Court was composed of seven judges, and had the work been equally distributed, as now, each judge would have had to prepare the opinions in about five causes annually, the total number disposed of yearly averaging about thirty-three. But as Marshall wrote in nearly half the causes his average was increased to about fifteen and that of his associates decreased to about three opinions annually.

When this work is compared with the results of the present strenuous age, one marvels at the contrast, and, making due allowance for the work done on the circuit, almost wonders how the judges of that early period occupied their time.

The Appellate Division of the First Department of New

York disposes of over nine hundred causes annually; during the year 1902 it decided five hundred and eighty-five appeals from judgments and three hundred and sixty-six appeals from orders. The Supreme Court of the United States and the courts of last resort of the States must average three hundred and fifty causes annually. It has been estimated that more than three hundred thousand decisions are made annually in the United States. Twenty thousand of these are by appellate tribunals. There are published each year four hundred and twenty volumes of Federal and State reports, about seventy volumes of digests, one hundred volumes of statutes, and one hundred and fifty text books. This makes a total of seven hundred and forty volumes put out annually by the law publishers of the United States—a library of no mean proportions, filling a book case of six shelves twenty feet in length.

When Marshall took his seat, the American decisions, Colonial, Federal and State, were not sufficient to fill ten volumes of reports such as are now published by the official reporter of the Supreme Court, and the entire body of the English common law was less than the yearly product of the United States at the present day.

In examining Marshall's opinions the observer is impressed by the absence of citations. He rarely cited an authority or quoted from text books or decisions.

The opinion in McCulloch *v.* Maryland, covering thirty-seven pages, contains no citation, and that in the Dartmouth College case, covering thirty pages, contains but one, and that one to Blackstone. Close observers of the proceedings of the court assert that often after reading one of his opinions, the Chief Justice would say:

"These seem to me to be the conclusions to which we are conducted by the reason and spirit of the law. Brother Story will furnish the authorities."

But "Brother Story" and all the brethren had the same habit. They did not quote one authority where modern jurists quote a dozen. This was due no doubt in part to the fact that there were so few authorities to quote, but principally, I think, to the different style of judicial writing which then obtained. The clear, cool, sparkling spring from which those early jurists drank has been polluted by the tur-

gescent and turbid flood which has been pouring into it with increasing force for half a century.

Marshall had few tools with which to work. He was a pathfinder. He had no trail blazed by others to follow. He cut one himself through an almost virgin forest.

"When I examine a question," says Judge Story, "I go from headland to headland, from case to case. Marshall has a compass, puts out to sea and goes directly to his result."

He had few precedents in this country to vex him and keep him near the shore, and, when dealing with the Constitution, he had none. It was then that he ventured chartless out upon an unknown sea, with naught but the infallible compass of his own judgment to guide him.

A written constitution was a new experiment in government. For a republic it was absolutely unique. The work of interpretation had never been undertaken before. He had ample time at his command. All things considered, there is small wonder that the decisions of that early time have been spoken of as "those exquisite judgments." There was then ample opportunity for ornament and embellishment. There was no hurry, no tumult, no harassing social duties. The opinions of the Court were prepared with care and deliberation, and were the result of original thought. Marshall wrote in the most rarefied judicial atmosphere. His ears were not deafened by the jarring and discordant clamor of a hundred law mills, some of them in the hands of apprentices, grinding out decisions without number.

Then, too, there was something inspiring in the atmosphere which surrounded both bench and bar. It was in that golden age when the law was a profession and not a trade. It was before brains and ability had been syndicated with audacity and nerve as "legal preferred," and culture, learning and graceful rhetoric had been dumped, with other odds and ends, into the class of "legal common" and inventoried as so much "water."

The prizes contended for in the olden times were not only the pecuniary rewards of success, but there was something of the same emulation which inspired the knights of chivalry when they met each other in the lists. There was the "stern joy" which the warriors of the forum felt in meeting foemen worthy of their steel, the keen delight of

the rivalry, the intoxication of victory, the praise of the men and the smiles of the women. It is a pleasure even now to contemplate those splendid old advocates with their ruffled shirts and blue swallow tails, their courtly manners and classic diction.

There was Webster, the stately and magnificent, pleading for his Alma Mater; Clay, with his easy grace and fascinating smile; Pinkney, overwhelming the audience with his impassioned bursts of eloquence; Harper, profound in his knowledge of the law; and always, when a great argument was proceeding, there was a brilliant audience composed of the members of both Houses and the wealth and fashion of the capital. Small wonder at those dramatic scenes so often recounted when men turned pale and women wept. He must indeed have been a soulless advocate who did not feel the inspiration of the environment as he stood, "ringed round with the flame of fair faces" and the admiring gaze of the intellectual giants of the young republic.

As an illustration of that "royal purple eloquence" which in those early days echoed through the halls of justice, listen to Pinkney pleading the cause of the captors of the *Nereide*.[1] He is ridiculing the idea that an armed vessel of the enemy can be neutral in respect to her cargo, and that a condition of neutrality and war can exist under the same flag, and he thus proceeds:

"The prosopopœia to which I invite you is scarcely, indeed, within the power of fancy, even in her most riotous and capricious mood, when she is best able and most disposed to force incompatibilities into fleeting and shadowy combination; but if you can accomplish it, it will give you * * * a modern Amazon, more strangely constituted than those with whom ancient fable peopled the borders of the Thermodon—her voice compounded of the tremendous shout of the Minerva of Homer and the gentle accents of a shepherdess of Arcadia—with all the faculties and inclinations of turbulent and masculine War, and all the retiring modesty of virgin Peace. We shall have in one personage the pharetrata Camilla of the Æneid, and the Peneian maid of the Metamorphosis. We shall have Neutrality, soft and gentle, and defenceless in herself, yet clad in the panoply of her war-like neighbors—with the frown of defiance upon her brow, and the smile of conciliation upon her lip—with the spear of Achilles in one hand, and a lying protestation of innocence and helplessness enfolded in the other. Nay, if I may be allowed so bold a figure in a mere legal dis-

[1] (1815) 9 Cranch, 388.

cussion, we shall have the branch of olive entwined around the bolt of Jove, and Neutrality in the act of hurling the latter under the deceitful cover of the former."

Imagine a modern advocate attempting such daring flights into the blue empyrean of eloquence! If the judge be in an amiable frame of mind he may permit the orator to proceed, especially if his client happens to be present, but it is more than likely that he will be promptly recalled from "the borders of the Thermodon" and told that he has but five minutes in which to elucidate his next "point."

To-day in the Supreme Court there is the same imposing array of justices with their black gowns and dignified demeanor, but all else is changed. Arguments are no longer made by a few. The entire bar of the country is represented. They come with their "grips" from Chicago, St. Louis, San Francisco, New York and Philadelphia, argue their causes in business suits and hurry away to catch the "Congressional Limited." The audience is composed of sightseers and counsel waiting to be heard, and this is true of every court room in the land.

It is an interesting theme of speculation how Marshall would have succeeded had his career begun at the end instead of the beginning of the last century. Were he a member of the Supreme Court to-day, would he stand out above his associates as the Matterhorn dominates the adjacent Alps?

The last reported term of the Supreme Court, that of 1901, considered three hundred and seventy-five cases, of which one hundred and sixty-eight were orally argued, one hundred and twenty-six submitted on printed briefs, and the balance disposed of otherwise.

Some of the records now submitted aggregate several thousand printed pages, the briefs several hundred printed pages. Decisions innumerable, English and American, national and State, are cited in these briefs and must be examined by the judges. Could Marshall's genius, his calm judicial mind, his dignified and deliberate methods have flourished in this high-pressure age? Imagine him at one end of the telephone, with some long-distance lawyer at the other end, endeavoring to negotiate an arrangement by which the lawyer can reach Washington on the "Flyer,"

procure an injunction and return home the same evening on the "Cannon Ball." How Marshall would have chafed at the telephones, stenographers, typewriters, tyro digests, scissors-made text books and all the din and clatter of the professional methods of this strenuous epoch! What would have been the result if the judgment in Marbury *v.* Madison, for instance, had been dictated to a stenographer instead of being written and rewritten by his painstaking pen? Instead of being a model of style, it might have had all the vulgar deformities of modern machine-made law. Instead of being concise, it might have been diffuse. Instead of exemplifying the result of his own thought, it might have been padded with endless quotations from text-book and report. Instead of being a legal classic, it might have been a mere commonplace. In the quiet of his library, with no distracting cares, with no domestic or financial problems to perplex and harass, with no interruptions from irresponsible seekers after justice and the innumerable bores who infest the highways and by-ways of twentieth-century trade, he could think in peace and quiet, weigh the great problems again and again, balance one argument against the other, and turn the light upon them from every side. He had time to write and rewrite his opinions, change the diction, select the best word to express his meaning, clarify and condense. Thus his decisions became models of logic and rhetoric as well. With the modern pressure such careful analysis is impossible. With hundreds of cases waiting and each litigant clamoring for an early decision, such care as Marshall was able to bestow is out of the question. Mortal mind cannot stand it. It hurts to think under high pressure, the brain rebels, just as does the body when taxed beyond its capacity. A modern judge who devoted the time to the preparation of his decisions that Marshall and his associates did a century ago, would either be hopelessly in arrears or in a lunatic asylum at the end of the first decade of his service.

Of the twenty thousand decisions of appellate courts published annually it is safe to say that less than one thousand are of any general interest to the public or the profession at large.

Within the memory of living men it was possible for

every lawyer of fair intelligence to familiarize himself with all the leading cases. To-day, unless his memory is abnormally developed, it is impossible for him to remember the names of the reports even, let alone their contents. Instead of developing his cases on the lines of fundamental legal principles, he shrivels into a legal scavenger raking over the annual dump heaps to find some ready-made authority to cover the nakedness of his facts. If he have sufficient patience he will surely be successful, but his faculties are dwarfed and stunted in the process. His mind becomes a battery, of no small storage capacity it is true, but requiring constant "charging" and liable to "short-circuit" at the most inopportune moments.

In Marshall's day the bar sought to make precedents, not to find them. A recent writer says: "The curse of the lawyer's life is the immense and constantly growing mass of books." Truer words were never spoken. It is a tremendous drain upon the income of the young practitioner to supply himself with the books which it is absolutely necessary for him to possess, namely, the reports of the United States courts and the courts of his own State. These come with amazing rapidity and relentless regularity. In the State of New York he is taxed for twenty-five volumes annually. Every thinking lawyer admits the existence of the disease, but few can suggest a remedy. Some think it is to be found in codification. Codify the common law, say they; but who will undertake the task? Our experience in New York with statutory codification has not been such as to warrant a belief that adequate relief can thus be found. "Let the courts and judges indicate the decisions which are to be published," say others. The answer will be found in the quaint and homely phrase of the old practitioner, "Judges are people."

It is hardly to be expected that they will, *sponte sua*, deprive the profession of the priceless fruits of their judicial labors. Besides, the decisions, when filed, are accessible to the public, and it would be difficult to prevent their publication. But may not the bench and bar united inaugurate a reform? There is an over-production of law. The judges who write interminable opinions and who write something on every conceivable occasion are largely responsible for this

condition. If less law were written, less would be published. If the courts of last resort would set the fashion of writing fewer and shorter opinions, the inferior courts would soon fall into line and the problem would be solved.

In the great majority of causes no question of public interest is involved. If these were decided in this country, as they are in other countries, either without an opinion or with a short memorandum, many of the evils which now confront us would be abated, and, after a short interval of dissatisfaction, the profession would not only acquiesce, but delight in the change. In the effort to accomplish this result, the bar should co-operate.

We have reached a pass where many members of the profession assume that a cause has not been properly considered by the Court unless a long dissertation covering every question argued accompanies the decision. A vast amount of time, which might better be used in other work, is consumed in satisfying this unreasonable sentiment.

Where no error is found in the record, why not say so and affirm the judgment without restating in other language what has been said in the court below? Where error is found, why not point it out briefly and reverse the judgment, unaccompanied by an elaborate argument to show that in other respects the judgment is inerrable?

And why is it necessary in the brief, as well as in the decision, to fortify every axiomatic proposition with innumerable authorities and long quotations from reports and text books which are easily accessible?

These suggestions are made with diffidence, because I cheerfully admit that I have frequently offended against the doctrine which I now advocate. I may, however, urge as an excuse that if a long opinion be ever justifiable, it is in an equity case in the United States courts where the facts are first presented to the Court on a printed record.

That the verbosity of the bar is partly responsible for the verbosity of the bench can, I think, be easily demonstrated. In the hurry of modern practice it is seldom that a lawyer takes time to construct such a brief as was common in the days of Marshall. A conglomerate mass of quotations from the evidence, quotations from text books and quotations from reports, interspersed by stenographic

observations of counsel, is presented to the Court under the name of "brief." Sometimes two hundred and fifty pages of this undigested matter is handed to an overworked and tired judge with the knowledge that the mere physical act of reading it will occupy days of his time. Can there be a better illustration of "man's inhumanity to man?" It takes hard work, time and brains to write a perfect brief; but if this preliminary work were oftener done by the bar, there would be less complaint of the discursiveness of the bench.

We have certainly passed through great changes since the days of Marshall, but there is no reason for a pessimistic view of the future. True, we have too much litigation and too little pure law; true, our system is too complicated; true, we have to pass through endless technicalities before reaching a result; but the profession has among its members men as learned and as honorable as those who contended before the great Chief Justice.

In order that we may continue to occupy the high plane of the past it is wise to keep ever in remembrance the example of that incomparable lawyer. We cannot hope to reach the high altitudes trodden by him, but we can still follow in his footsteps and emulate his virtues with a grateful sense of the inestimable benefits which his labors have conferred upon his country and mankind.

ALFRED C. COXE.